UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

STARBUCKS CORPORATION

Employer

and **Case 03-RC-282139**

WORKERS UNITED

Petitioner

SUPPLEMENTAL DECISION SUSTAINING CHALLENGES, ISSUING REVISED TALLY OF BALLOTS, OVERRULING OBJECTIONS, AND ISSUING CERTIFICATION OF REPRESENTATIVE

Based on a petition filed on August 30, 2021,[1] and pursuant to a Decision and Direction of Election issued on October 28 (the Decision),[2] an election was conducted by mail beginning on November 10, to determine whether a unit of employees of Starbucks Corporation (the Employer) wish to be represented for purposes of collective bargaining by Workers United (the Petitioner). That voting unit consists of:

> All full-time and part-time Baristas and Shift Supervisors employed by the Employer at its 4255 Genesee Street, Cheektowaga, New York facility[3], excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

The eligibility date established by the Decision was October 22.[4] A tally of ballots, completed on December 9 at the conclusion of the voting period, showed the following results:

Approximate number of eligible voters.	46
Void ballots.	0
Votes cast for participating labor organization.	15
Votes cast against participating labor organization ….	9
Valid votes counted.	24
Challenged ballots.	7
Valid votes counted plus challenged ballots ……..….	31

The challenged ballots were sufficient in number to affect the results of the election. On December 16, the Petitioner timely filed 13 objections to the election.

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[1] All dates hereinafter are in 2021 unless otherwise stated.
[2] An erratum was issued on November 1.
[3] This facility will henceforth be referred to as "the Genesee Street store."
[4] The parties informed the Region after the issuance of the Decision that the most recent payroll period preceding issuance of the Decision ended on October 24, not October 22. This discrepancy is immaterial to resolution of the outstanding issues.

For the reasons articulated below, I have concluded that the challenges to each of the seven ballots at issue should be sustained. As such, I will issue a revised tally of ballots reflecting that the majority of the valid votes cast were for the Petitioner. As this action renders the Petitioner's objections moot, I shall also overrule the Petitioner's objections and issue a certification of representative.

THE CHALLENGED BALLOTS

The Petitioner challenged the ballots of six individuals on the basis they were not employed in the bargaining unit as of the eligibility date or the date of the election: Brittany Buchholz, Katerina Esford, Christopher Fuentes-Frysz, Abby Grasta, Nicholas Guay, and Shannon Weber. The Employer challenged the ballot of Alex Ranick on the basis that Ranick was no longer employed by the Employer on either the eligibility date or the date of the election.

Via letter dated December 17, the Acting Regional Director solicited the parties' positions on the challenged ballots and requested the submission of all evidence in support of the parties' positions. The parties submitted position statements and certain documentary evidence in response. I have based my conclusions on a review of the evidence submitted by the parties as well as record evidence from the pre-election hearing in this matter. A review of this evidence and the parties' positions demonstrates that the challenged ballots do not raise substantial and material factual issues necessitating a hearing. See Sec. 102.69(c)(i) and (ii) of the Board's Rules and Regulations.

THE EMPLOYER'S CHALLENGE

As stated above, the Employer challenged the ballot of Alex Ranick on the basis that this voter was no longer employed by the Employer as of the eligibility date. The Petitioner did not take a position on Ranick's eligibility. In its response to the Acting Regional Director's December 17 letter, the Employer submitted payroll documents establishing that Ranick is no longer employed by the Employer. These documents further establish that Ranick's last day of work for the Employer was October 3.

It is well established that, in order to be considered eligible to vote, an individual must be "'employed and working in' the bargaining unit on the eligibility date, unless absent for certain specified reasons." *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007), quoting *Dyncorp/Dynair Services*, 320 NLRB 120 (1995). In other words, "[w]hen an employee quits his employment and stops working prior to election day, he is not eligible to vote." *Dakota Fire Protection, Inc.*, 337 NLRB 92, 92 (2001), citing *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 518 (1983). "In mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and the date they mail in their ballots to the Board's designated office." *Dredge Operators, Inc.*, 306 NLRB 924, 924 (1992), citing *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194, 195-196 (1976); *Eck Miller Transportation Corp.*, 211 NLRB 251, 251 fn. 2 (1974); and *Plymouth Towing Co.*, 178 NLRB 651 (1969).

Because Ranick was not employed by the Employer on either the eligibility date or the date of the election, I find that he was not an eligible voter and therefore sustain the challenge to his ballot.

THE PETITIONER'S CHALLENGES

The Petitioner's rationale for each of its challenges is identical. The Petitioner contends that Buchholz, Esford, Fuentes-Frysz, Grasta, Guay, and Weber were temporarily stationed in the bargaining unit for a short period in late September and early October while their "home store" was undergoing renovations.[5] The Petitioner contends that these employees worked at the Genesee Street store for a short time before returning to the Niagara Falls Boulevard store. As such, the Petitioner contends that these employees were not employed in the bargaining unit on either the eligibility date or the date of the election. The Petitioner further contends that these individuals did not work sufficient hours within the bargaining unit during the relevant time frame and are ineligible on that basis. Finally, the Petitioner claims that these individuals were not bona fide voters insofar as the Employer improperly placed these workers at the Genesee Street store in an effort to dilute the voting unit.[6]

Conversely, the Employer contends that these challenged voters worked sufficient hours within the bargaining unit during the relevant time frame, remain employed by the Employer, and are therefore eligible voters.

Payroll records submitted by the Employer in response to the Acting Regional Director's letter show that the six voters in question worked at the Genesee Street store on multiple days beginning in mid-September.[7] These records also demonstrate that Buchholz, Grasta, and Weber did not work at the Genesee Street store after October 8. Esford's last shift at that store was on October 9, Fuentes-Frysz's was on October 11, and Guay last worked at the Genesee Street store on October 13.

The record in the pre-election hearing preceding the issuance of the Decision in this matter contains, inter alia, a record of each shift worked by all employees in the Employer's Buffalo market during most of the Employer's 2020 fiscal year and a portion of the Employer's 2019 fiscal year.[8] This data covers a period of time from April 24, 2019 through September 19, 2021. This data demonstrates that, during the time period reflected therein, none of the six challenged voters worked at the Genesee Street store prior to September 16. The record in the pre-election hearing also includes the September 28 testimony of Regional Director Deanna Pusatier,that the Niagara Falls Boulevard store was closed at that time for renovations. Pusatier elaborated that employees at that store were scheduled to work at other stores during this renovation.

With respect to the merits of the Petitioner's challenges, the Employer is incorrect in asserting that the dispositive issue is whether the challenged voters worked a sufficient number

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[5] The term "home store" refers to the store to which an employee is permanently assigned. There is no dispute that the home store of the six voters in question is located on Niagara Falls Boulevard in Amherst, New York (the Niagara Falls Boulevard store).

[6] This rationale is coextensive with Petitioner's Objection 11.

[7] Specifically, five of the six challenged voters were assigned to work at the Genesee Street store on September 16. The sixth, Esford, worked her first shift at the Genesee Street store on September 18.

[8] Decision Scientist Eli Hanna, the witness who compiled the relevant documents, testified that the relevant data was extracted from the Employer's "Partner Hours System" during the time period of April 24, 2019 through September 19, 2021.

of hours in the bargaining unit to be considered "regular part-time."[9] The evidence clearly establishes that the assignment of the Niagara Falls Boulevard store employees to the Genesee Street store was occasioned by the temporary closure of the former facility. Thus, the proper inquiry for each of the challenged voters is "whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created." *Marian Medical Center*, 339 NLRB 127, 128 (2003).

In *Marian Medical Center*, the Board considered a challenge made to a maintenance employee. The employee in question was regularly assigned to a facility outside the bargaining unit but was assigned to the location at which the vote occurred. However, this assignment was temporary and only intended to last until renovations to his normal work location were completed and a permanent, in-unit replacement was hired. Under those circumstances, the Board concluded that "the term of [the employee]'s temporary assignment was finite and reasonably ascertainable," and that the employee was therefore ineligible to vote. 339 NLRB at 128-129.

Similarly, in *Irwin & Lyons*, 51 NLRB 1370, 1373 (1943), the Board excluded from eligibility transferees from a temporarily shuttered logging camp. The Board noted that these workers were only present at the "pending resumption of operations at another camp, they have no direct interest in choosing a collective bargaining representative…" See also *Curaleaf Massachusetts, Inc.*, 370 NLRB No. 100, slip op. at 1 fn. 1 (2021) (employees transferred to bargaining unit to cover immediate staffing shortages were ineligible to vote); *Kaiser Cement & Gypsum Corp.*, 158 NLRB 1740, 1744 (1966) (employees temporarily assigned to facility due to labor dispute at their primary facility were ineligible to vote).

The reasoning applied by the Board in the above cases is applicable here and warrants the same result. The six challenged voters were assigned to work at the Genesee Street store while their normal work location was being renovated. It is significant that none of the challenged voters were scheduled to work at the Genesee Street store after October 13. Given these facts, it is abundantly clear that their temporary assignment to that location had concluded no later than October 13.[10] As such, they were not employed in the bargaining unit as of either the eligibility date or the dates they cast their ballots and were therefore ineligible to vote in this election.

The Employer also argues that the Petitioner's failure to challenge the ballot of Ryan Mox, an allegedly similarly situated employee, evinces an attempt by the Petitioner to selectively challenge voters and effectively forecloses the Petitioner from successfully challenging the eligibility of these six employees. The payroll records submitted by the Employer indicate that Mox, whose home store was not the Genesee Street store, nevertheless worked at that location in September and October. Mox's name appeared on the Voter list submitted by the Employer and he cast an unchallenged ballot during the election. I reject the Employer's contention that the

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[9] See, generally, *Davison-Paxon Co.*, 185 NLRB 21 (1971).

[10] I stress that although the evidence demonstrates that the Niagara Falls Boulevard store employees have not returned to work at the Genesee Street store, my finding in this regard is based on the voters' respective statuses as of the eligibility date. Thus, I am not making an "after-the-fact" determination based on events that occurred after the election occurred. See *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973) ("[f]or very practical reasons, we cannot determine voter eligibility on the basis of after-the-fact considerations").

failure to challenge Mox's ballot estops the Petitioner from challenging the ballots of the six voters at issue. It is well established that Board and Supreme Court precedent requires that "uncontested ballots…be given absolute finality." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946). Permitting or requiring an examination as to whether the Petitioner should have challenged Mox's ballot would disturb this longstanding principle. As such, the Petitioner's alleged failure to challenge Mox's ballot is immaterial to the resolution of the challenged ballots at issue in the instant case.

For the above reasons, I conclude that the six employees challenged by the Petitioner were not eligible voters. I therefore sustain the challenges to the ballots of Brittany Buchholz, Katerina Esford, Christopher Fuentes-Frysz, Abby Grasta, Nicholas Guay, and Shannon Weber.[11]

REVISED TALLY OF BALLOTS

IT IS HEREBY ORDERED that the following revised tally of ballots is issued:

Approximate number of eligible voters.	46
Void ballots.	0
Votes cast for participating labor organization.	15
Votes cast against participating labor organization …	9
Valid votes counted	24
Challenged ballots.	0
Valid votes counted plus challenged ballots …….	24

The challenged ballots are not sufficient in number to affect the results of the election and a majority of the valid votes counted has been cast for the Petitioner.

THE OBJECTIONS

As the revised tally of ballots has demonstrated that the Petitioner has received a majority of the valid votes cast in this election, I hereby overrule the Petitioner's objections as moot. See, e.g., *Pine Shores, Inc.*, 321 NLRB 1437 (1996) (objections rendered moot by resolution of determinative challenged ballots); and *Graham Ford, Inc.*, 224 NLRB 927, 927-928 (1976) (same).

CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board, **IT IS HEREBY CERTIFIED** that a majority of the valid ballots have been cast for:

Workers United

[11] Based on this conclusion, I do not reach the Petitioner's argument that the challenged voters were ineligible to vote because their assignment at the Genesee Street store was designed to dilute support for the Petitioner.

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time Baristas and Shift Supervisors employed by the Employer at its 4255 Genesee Street, Cheektowaga, New York facility, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision, which may be combined with a request for review of the regional director's decision to direct an election as provided in Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1)of the Board's Rules and may be filed at any time following this decision until 10 business days after a final disposition of the proceeding by the regional director. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: January 10, 2022

/s/NANCY WILSON

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